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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 75

GWIN, WHITE & PRINCE, INC.,

Appellant,

vs.

HAROLD E. HENNEFORD, THOMAS S. HEDGES AND T. E. JENNINGS, CONSTITUTING THE STATE OF WASHINGTON TAX COMMISSION,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

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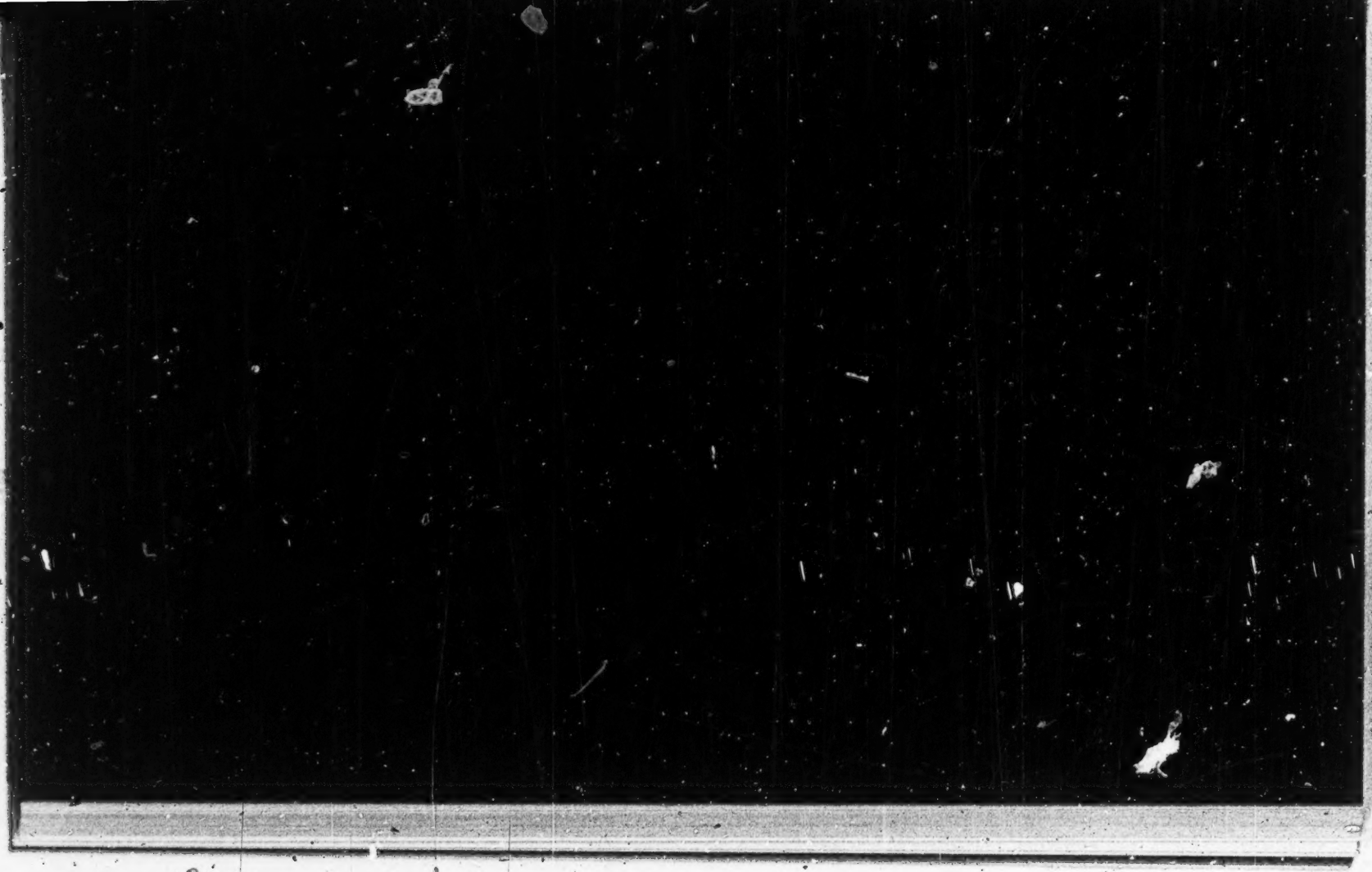

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SUPREME COURT OF THE UNITED STATES

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No. 75

GWIN, WHITE & PRINCE, INC., A CORPORATION,
Appellant,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, CONSTITUTING THE STATE OF WASHINGTON TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12-1 of the Rules of the Supreme Court of the United States, appellant submits this statement as to jurisdiction showing the basis upon which it contends that this Court has jurisdiction upon appeal to review the action of the Supreme Court of the State of Washington.

This appeal was submitted to the court of first instance upon the pleadings which consisted of plaintiff's complaint

and the defendants' demurrer to that complaint. The facts as shown by the pleadings are as follows:

Facts of the Case.

The appellant, Gwin, White & Prince, Inc., acting solely as agent of various growers and grower organizations in the States of Washington and Oregon, is a Washington corporation engaged in the business of marketing apples and pears produced in said States, making deliveries of fruit so sold, collecting the sales price, and remitting the net balance, with its accounting therefor, to said growers and grower organizations. The sales and shipments so made are in interstate or foreign commerce.

The stipulation entered into by the parties hereto and the contract attached to the stipulation show that the appellant transacts its entire business originating in the State of Washington under written contract with the Wenatchee-Okanogan Cooperative Federation made up of approximately twelve cooperative grower associations in the State of Washington, and that under said contract the appellant is bound to sell the products of the Federation, namely, apples and pears, and to obtain the widest possible distribution thereof; to inform the Federation and its members as to marketing conditions; to permit the investigation of its books and records by the Federation or its members; to be responsible for collections on all sales made by appellant or all shipments where the bill of lading runs to appellant or its order; to handle all traffic matters pertaining to shipments; and to attend to claims against carriers or others.

In the conduct of its business as agent for the growers the appellant maintains sales representatives at many points outside of the State of Washington, who, on behalf of the appellant, negotiate sales and on approval by the appellant of the same, execute at said points outside of the State of

Washington and on behalf of the plaintiff, written contracts of sale. The appellant also sends to its representatives outside of the State of Washington, in the performance of its duties, bulletins listing cars of fruit, some of which cars are at the time either stored outside of the State of Washington or are already moving in interstate commerce. The appellant spends very large sums of money on telegraph, telephone, and cable communications, all in foreign or interstate commerce, and further handles all bills of lading on all shipments made in compliance with the contracts of sale entered into with foreign and extra-state purchasers. Through its foreign and extra-state representatives, appellant attends to the delivery of said shipments and collects the proceeds therefrom which are thereafter forwarded to the appellant at Seattle, Washington.

For the performance of these services, appellant is paid the sum of eight cents per box for apples and ten cents per box for pears, which amount is deducted from the proceeds of sales by appellant prior to payment to the Federation.

Statute under Which Jurisdiction of Supreme Court is Invoked.

The jurisdiction of this Court is invoked under Section 237-a of the United States Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928 (Title 28, U. S. C., Sections 344-a, 861-a, 861-b).

Statutes of the State of Washington Here Challenged.

The statutes of the State of Washington, the validity of which is involved, are Chapter 191, Laws of Washington, 1933 (pp. 869, *et seq.*), as amended by Chapter 57, Laws of Washington Extraordinary Session 1933 (pp. 157, *et seq.*), and Chapter 180, Laws of Washington 1935, Sections 4 to 15 (pp. 709, *et seq.*), Sections 185 to 210, inclusive (pp. 830,

et seq.), and Section 216 (p. 849). These statutes create what is commonly known as the "Business and Occupation Tax."

Laws of Washington 1933.

Chapter 191, Laws of Washington 1933, Sec. 2 (2) (p. 871) provides in part:

> "* * * there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against * * * gross income * * *"

Section 1 (6) (p. 869) provides in part:

> "The term 'gross income' means * * * all receipts, actually received by reason of * * * the business engaged in, * * * without any deduction on account of * * * labor costs, * * * or any other expenses whatsoever * * *"

Subsequent sections of the Act provide for its administration by the appellees and provide stringent penalties in the event persons subject to the Act fail to comply therewith.

Laws of Washington Extraordinary Session 1933.

It was by Chapter 57, Laws of Washington Extraordinary Session 1933 (pp. 157, *et seq.*), which amended Chapter 191, Laws of Washington 1933 (pp. 869, *et seq.*), that an attempt was first made to subject the business of the appellant to the provisions of the earlier act by the addition of a new section to be known as 2-a. This section provides in part as follows:

> "(1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, * * *

an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *."

Laws of Washington 1935.

Chapter 180, Laws of Washington 1935, Section 4 (p. 709) provides in part as follows:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against * * * gross income of the business, * * * as follows: * * *."

Section 4-(e) (pp. 710, *et seq.*) provides in part as follows:

"Upon every person engaging within this state in any business activity * * * as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. * * *."

Section 5-(g) (pp. 712, *et seq.*) provides in part as follows:

"The term 'gross income of the business' means the * * * compensation for the rendition of services, * * * all without any deduction on account of * * * labor costs, * * * or any other expense whatsoever paid or accrued and without any deduction on account of losses;"

Section 216 (p. 849) provides in part as follows:

"No tax shall be imposed under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933, Extraordinary Session, State of Washington, with respect to the period beginning May 1, 1935, and ending July 31, 1935, and the provisions of such act shall be deemed amended in conformity herewith. * * *."

Other sections of the Act provide for its administration by the appellees and provide stringent penalities in the event persons subject to the Act fail to comply therewith.

The statutes referred to above have been before the Supreme Court of the State of Washington and before the Supreme Court of the United States on several occasions. It is now well settled that the tax is not a property tax. It is an excise tax measured by and imposed upon gross income. It is imposed upon the privilege of engaging in business. It is solely a revenue measure and not an exercise of the police power of the State.

State ex rel. Stiner v. *Yelle*, 174 *Wash.* 402, 25 Pac. (2d) 91;

Cascade Telephone Co. v. *State Tax Commission*, 176 Wash. 616, 30 Pac. (2d) 974;

Supply Laundry v. *Jenner*, 178 Wash. 72, 34 Pac. (2d) 363;

Paramount v. *Hennefard*, 184 Wash. 376, 51 Pac. (2d) 385; certiorari denied 298 U. S. 665;

Northern Pacific v. *State Tax Commission*, 297 U. S. 403, affirming 183 Wash. 33, 48 Pac. (2d) 931;

Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650, reversing 182 Wash. 163, 45 Pac. (2d) 942; 49 Pac. (2d) 115.

Judgment of the Supreme Court of the State of Washington.

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered February 9, 1938. The time for taking an appeal began to run from the date of said judgment. (See *Puget Sound Power & Light Company* v. *King County*, 264 U. S. 22, where the time for taking an appeal from the judgment of the Supreme Court of the State of Washington is considered). The petition for appeal is presented April 8th, 1938.

The judgment and decree of the Trial Court dated May 26, 1937, provides in part:

> "It is by the court ordered, adjudged, and decreed that the prayer of plaintiff's complaint be and the same hereby is denied, and that this action be and it hereby is dismissed with statutory costs to be taxed."

The judgment of the Supreme Court of the State of Washington affirms the judgment and decree of the Trial Court. A judgment of dismissal is final.

Wilson v. *Republic Iron & Steel Company*, 257 U. S. 92;

Gulf Refining Co. v. *United States*, 269 U. S. 125;

Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650.

Court Appealed from is Highest Court of the State of Washington.

The judgment of the Supreme Court of the State of Washington is that of the highest Court in which, under the laws of the State of Washington, such judgment could be had. No further appeal is possible save for the Supreme Court of the United States; hence, the appeal is taken from "a final judgment or decree in any suit in the highest Court of the State in which a decision in the suit could be had."

Constitution of the State of Washington, Art. IV, Sections 1, 4 and 6.

See—

Remington's Revised Statutes of Washington, 1932, Vol. 1, pp. 422, 425, 428;

Remington's Revised Statutes of Washington, 1932, Vol. 4, Sec. 1716, p. 10;

Section 1737, p. 72;

Section 1740, p. 74;

Section 1741, p. 75.

How the Federal Question Was Raised.

The questions sought to be reviewed in this Court were raised in the Superior Court of Thurston County (the court of first instance) by appellant's complaint of which Paragraphs III, IV, V, VII, and IX are as follows:

"III.

That the plaintiff, acting solely as agent for various growers and grower organizations in the States of Washington and Oregon is engaged in the business of marketing apples and pears produced in the said States of Washington and Oregon and in making deliveries of fruit so sold, collecting the sales price and remitting the net balance thereof to said growers and grower organizations.

IV.

That all of the sales of fruit made by the plaintiff are made in the course of interstate and foreign commerce save and except an occasional sale of a small quantity of fruit sometimes made within the State of Washington. That with the foregoing insignificant exception all of the fruit so sold by the plaintiff is shipped and delivered outside of the State of Washington to purchasers who are non-residents of the State of Washington, said fruit going to all parts of the United States and a very large portion thereof to foreign countries.

V.

That as a part of plaintiff's business it has sales representatives in very many points outside of the State of Washington, who on behalf of the plaintiff, negotiate said sales and on approval of the plaintiff of the same execute in said points outside of the State of Washington and on behalf of the plaintiff written contracts of sale. That also as a part of its business plaintiff during the fruit season, which extends over

a large portion of the calendar year, sends to its aforesaid representatives outside of the State of Washington daily bulletins listing cars of fruit, some of which are at the time either stored outside the State of Washington or are already moving in cars in interstate commerce. That in conducting its aforesaid business and in making said sales, all of which, both as to origin and completion, are interstate or foreign commerce, plaintiff expends very large sums of money in telephone, telegraph and cable communications, all in interstate and foreign commerce. That as a further part of its business, plaintiff handles the bills of lading on all shipments made in compliance with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to the plaintiff at extra-state points, and that through its foreign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom, which are thereafter forwarded to the plaintiff at Seattle, Washington, all in the course of interstate and foreign commerce.

* * * * * * *

VII.

That the business of the plaintiff, as hereinbefore set forth, constitutes all its business, and that the same, both as to the inception and completion of said sales and the delivery of said fruit, consists of interstate and foreign commerce, and that the plaintiff's income is wholly derived from such interstate and foreign commerce.

* * * * * * *

IX.

That the enforcement of the collection of said business tax by the defendants against the plaintiff is in violation of the Commerce Clause of the Constitution of the United States and constitutes an illegal interference with interstate and foreign commerce in con-

travention of the laws of the United States, and constitutes an impost or duty on exports in violation of Section 10, Article I of the Constitution of the United States."

Paragraphs VIII and X of the complaint set forth equitable grounds for relief. A demurrer to the complaint was filed in the action by the appellees, and the matter was submitted on the merits on the demurrer to the court for adjudication. The trial court delivered a memorandum opinion, copy of which is attached hereto and made a part hereof. The decision of the trial court held that the demurrer should be sustained, not upon the ground that the appellant is not engaged in interstate commerce but upon the ground that the tax is upon the privilege of the domestic corporation to exist in the state. On May 26, 1937, the trial court entered a final judgment dismissing the action, to all of which the appellant duly excepted and its exception was allowed. An appeal was taken to the Supreme Court of the State of Washington, the appellant urging in its assignment of error the same constitutional grounds set forth in its complaint. Such assignments of error to the Supreme Court of the State of Washington appear in the brief of appellant in that Court in accordance with State practice.

Remington's Revised Statutes of Washington 1932, Vol. 4, Sec. 1730, p. 31;

Remington's Revised Statutes of Washington 1932, Vol. 1, p. 146, Rules of the Supreme Court, Rule VIII.

The third of such assignments of error was as follows:

"3. The trial court erred in holding that the imposition and collection from the appellant from the Business and Occupation Tax does not impose a burden upon interstate and foreign commerce, in violation of the Commerce Clause of the Constitution of the United

States, and that the imposition of said tax upon appellant does not violate Article I, Section 9, Clause 5, and Article I, Section 10, Clause 2 of the Constitution of the United States as being an impost or duty on exports."

The Supreme Court of the State of Washington affirmed the judgment of the Superior Court of Thurston County and in its opinion, copy of which is hereto attached and made a part hereof, held as follows:

(1) That the services rendered by appellant are performed wholly within the State of Washington.

(2) That such services are related only incidentally to interstate and foreign commerce, and that appellant is not a necessary factor in such commerce.

"We repeat, that if the sales and shipments of the Washington fruit by the owners to points without the state constituted interstate commerce, it does not follow that the services performed by the appellant, as agent or contractor, are so connected with the interstate transactions as to make those services a part of the interstate commerce. Any effect, at most, of such services upon interstate commerce is but remote, indirect and incidental; therefore, such activities of appellant as agent or contractor are within the state's legitimate taxing power."

The opinion and judgment which the Supreme Court rendered and entered could not have been rendered and entered without denying to appellant all the rights asserted to be its under the constitutional privileges relied upon and said opinion and judgment cannot be rested upon any independent non-Federal grounds.

It is submitted that the judgment plainly and definitely draws in question the validity of the statute as applied to appellant, on the ground of its being repugnant to the Constitution of the United States, as required by Section 237

of the Judicial Code, as amended, and that this appeal comes within the proper jurisdiction of this Court.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

Questions Involved are Substantial as Shown by Repeated Decisions of This Court.

The following cases substantiate appellant's contention that one engaged in an essential and component part of, and link in, interstate and foreign commerce is himself engaged in interstate and foreign commerce, and that the questions involved are substantial.

McCall v. *California*, 136 U. S. 104;
Texas Transport & T. Co. v. *New Orleans*, 264 U. S. 150;
Desanto v. *Pennsylvania*, 273 U. S. 34;
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;
Lemke v. *Farmer's Grain Company*, 258 U. S. 50;
Puget Sound Stevedoring Co. v. *Tax Commission*, 82 U. S. Supreme Court Law Ed. Advance Opinions, page 64;
Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650.

The complaint of appellant alleges and the demurrer of the appellee admits that appellant operates a far-flung business actively operating in many foreign states and countries, making sales in and deliveries to extra-state and foreign points.

As appellant is engaged solely in interstate and foreign commerce, the imposition of the Business and Occupation Tax in the States of Washington and Oregon upon its gross receipts is in violation of Article I, Section 9, and Article I, Section 10 of the Constitution of the United States and is in direct violation of the Commerce Clause of the Constitution of the United States.

Respectfully submitted,

CARL E. CROSON,
OFELL H. JOHNSON,
Counsel for Appellant.

EXHIBIT "A".

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THURSTON COUNTY

No. 16434

GWIN, WHITE & PRINCE, INC., a Corporation, *Plaintiff*,

vs.

HAROLD HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State Tax Commission, *Defendants*.

Memo. Opinion.

I have very carefully considered the authorities cited by counsel and still feel that the question is a very close one. I am of the opinion that the defendants' demurrer should be sustained, not upon the ground that the plaintiff is not engaged in interstate commerce, but upon the ground that it is a domestic corporation and that the tax levied is not a tax upon interstate commerce but upon the privilege of the domestic corporation to exist in the state.

D. F. WRIGHT,
Judge.

EXHIBIT "B".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 26793. En Banc.

GWIN, WHITE & PRINCE, INC., a Corporation, *Appellant*,

v.

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, Constituting the State of Washington Tax Commission, *Respondents*.

Filed Feb. 9th, 1938

This action was instituted by Gwin, White & Prince, Inc., a domestic corporation of Seattle, to restrain the state tax

commission from enforcing against the plaintiff the provisions of title II, ch. 180, L. 1935, for collection of a business or occupation tax from all persons engaged in business activities in the State of Washington. The appeal is from the judgment of dismissal rendered after a demurrer had been sustained to the complaint.

The facts presented by the allegations of the complaint, which are admitted by the demurrer to be true, and the stipulation of the parties, are in substance as follows: The appellant, acting solely as agent of various growers and grower organizations in Washington and Oregon, is engaged in the business of marketing apples and pears produced in Washington and Oregon and in making deliveries of fruit so sold. The growers and grower organizations have the exclusive authority to fix the price at which their or its products may be sold by appellant who is required to collect the sales price of fruits sold and to deposit the proceeds of the sales in a separate fund entitled "Gwin, White & Prince, Inc., Trustee". From this fund appellant deducts its charges as fixed by the contract of the appellant with the growers and pays the balance to the contracting organization. Appellant transacts its entire business originating in the state of Washington under a written contract with the Wenatchee-Okanogan Co-Operative Federation made up of approximately twelve co-operative associations in this state. Under the terms of that contract appellant is the exclusive agent of the federation to sell and collect the proceeds from sales of all commercially packed apples and pears which come into the possession or control of the federation as agent for its members. By that contract the appellant is obligated to sell the fruit and to obtain the widest possible distribution of same, to inform the federation and its members as to marketing conditions, to be responsible for collections on all sales made by appellant on all shipments where the bill of lading runs to appellant or its order, to handle all traffic matters pertaining to shipments and to attend to the collection of claims against carriers or others. The compensation to be paid to appellant for its services under the contract is eight cents a box for apples and ten cents a box

for pears. Except for an occasional sale of a small amount of fruit made within this state, all of the fruit sold is shipped to points outside the state of Washington; that is, the fruit is shipped to other states and to foreign countries. In the conduct of its business as agent for the fruit growers, the appellant maintains sales representatives in many points outside of the state of Washington, both within the United States and in Europe, whose duty is to negotiate sales, and who execute written contracts of sale in appellant's name and on its behalf at their respective places of business outside of the state of Washington.

As a part of its business, the appellant sends to its representatives outside of this state daily bulletins listing cars of fruit which are for sale. The appellant gives shipping directions to the respective growers and sellers and handles all of the bills of lading on shipments, most of which are consigned to appellant at points outside of this state. Upon arrival of the fruit at its destination, appellant attends to the delivery of shipments and collection of the proceeds therefrom.

Upon the ground that it is acting only as an agent for the fruit growers and that it is engaged solely in interstate commerce, appellant has never taken out a license under the commission merchants law of this state. The state tax commission's demand for payment of a business or occupation tax upon the appellant's gross revenue (commission of eight cents a box for apples and ten cents a box for pears) derived from the business done by the appellant under its contract as agent of the fruit growers was rejected. That is, the state tax commission's claim of a tax liability on the total commissions appellant receives from the growers for Washington-grown fruit sold and shipped to points within and without this state was denied. Appellant's action to restrain the state tax commission from enforcement of the occupation tax statute resulted, as stated above, in dismissal of the action following sustaining of demurrer to the complaint.

Appellant contends that the imposition of the occupation tax upon it constitutes a direct impost upon the gross proceeds of appellant's foreign and interstate business;

therefore, is in violation of article I, Sec. 9, clause 5, and article I, Sec. 10, clause 2, of the constitution of the United States, reading as follows:

> "* * * No tax or duty shall be laid on articles exported from any state; * * *.
>
> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *.

All persons engaged in business in this state are required by title II, ch. 180, L. 1935, to pay an occupation tax for the act or privilege of engaging in business activities. The tax is measured by a percentage of the gross income solely of that business. In the case at bar the tax is measured by a percentage of the appellant's gross income, consisting of the commissions of eight cents a box for apples and ten cents a box for pears produced in the state of Washington and sold and shipped to points within and without this state. The tax which the state tax commission seeks to exact of the appellant is a tax laid for the purpose of revenue only and is measured, not by the sales price of the fruit, but by the amount received by the appellant for its services as the exclusive agent of the growers fixed on a "per box" basis.

The United States Supreme Court held in *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292, that a state tax on the business of selling goods in foreign commerce measured by a percentage of the entire business transacted is both a regulation of foreign commerce and an impost, or duty on exports, and is, therefore, void.

> "There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of the business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimina-

tion. * * * " *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384.

The appellant may not successfully invoke the rule that if a contract of sale requires transportation across state lines the connection is so close as to render the sale itself immune from taxation. In the case at bar we are not dealing with a sale, but with a contract of agency—a contract for services to be rendered by appellant for the fruit growers.

The occupation tax is imposed upon all persons for the privilege of engaging in business activities in this state. The appellant is a domestic corporation operating, entirely within this state, a business which is exclusively with his principals, certain fruit growers; and for its services to its principals the appellant is paid a commission as recited above. The tax imposed upon the appellant is not upon imports or exports or interstate or foreign commerce. Appellant is not a necessary factor in such commerce. Appellant renders an independent service—engages in a business within this state—which is advantageous to those who form a component part or link in such commerce, but that does not render invalid the imposition of the occupation tax as it is not in conflict or inconsistent with the Federal constitution.

In *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, it was held that a license tax measured by gross commissions imposed on factors and brokers buying or selling on commission as applied to a commission merchant who negotiated sales on behalf of principals residing in other states with respect to goods located in other states was valid. The court stated that the tax was clearly levied upon the complainants in respect to the general commission business they conducted and not on the principal of the complainants. The court said:

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact

that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necesarily involve the taxation of interstate commerce, forbidden by the Constitution. * * *

"This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."

In *Crew Levick Company* v. *Commonwealth of Pennsylvania*, 245 U. S. 292, cited above *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, was distinguished, and in the course of its opinion the court said:

"* * * Besides, *the tax imposed* in the *Ficklen Case was not* directly *upon the business* itself or *upon the volume* thereof, *but upon the amount of commissions earned* by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional." (Italics ours.)

In *American Manufacturing Company* v. *City of St. Louis*, 250 U. S. 459, the court had under consideration an ordinance conditioning the right to manufacture goods within the city upon payment of a license tax computed upon the amount of the sales of the goods. It was contended that the ordinance, in effect, imposed a tax on sales of goods in the course of interstate commerce. In holding that the ordinance did not impose a tax on sales, the court said:

"* * * No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales

of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

"There is no doubt of the power of the State, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the States are free to lay privilege and occupation taxes."

We do not agree with the argument, that as sales of Washington fruit for delivery without the state made directly by appellant's principals are immune from the tax in question, appellant is entitled to the same immunity as it is merely a local agent for growers and associations in his state who have fruit to be sold. If those fruit growers and associations choose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business.

Counsel for appellant cite as sustaining authority *Puget Sound Stevedoring Company* v. *The Tax Commission of the State of Washington*, 189 Wash. 131, 63 P. (2d) 582, 82 L. Ed. 64, — U. S. —. In that case we sustained, against the protest of the taxpayer that an unlawful burden was imposed thereby upon interstate and foreign commerce, a tax laid upon the business of a stevedoring company, the amount of the tax being measured by a percentage of the gross receipts of the stevedoring company. The United States Supreme Court reversed our decision on the ground that the taxpayer was actually engaged in interstate commerce. The court said:

"The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at

> the "first place of rest", and vice versa.' In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purposes of this case as those at the ship's sling. The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments. The situation thus presented has no resemblance to that considered in *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21, 26 where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being 'contracted and paid for independently of any contract or payment for strictly interstate transportation.' The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefore a percentage of the gross receipts."

Clearly, the citation is inapplicable.

The tax imposed in the case at bar is not directly upon the business itself or upon the volume of business, but upon the amount of commissions earned by the appellant. In principle the case at bar and *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, are indistinguishable.

The sales made through the sales representatives of the appellant in other states were Washington contracts. The activities of those sales solicitors in other states did not transform appellant's business into interstate commerce so as to exempt appellant from payment of the occupation tax of which it complains. See *Hopkins* v. *United States*, 171 U. S. 578, and *Blumenstock Bros.* v. *Curtis Publishing Company*, 252 U. S. 436.

We repeat, that if the sales and shipments of the Washington fruit by the owners to points without the state consituted interstate commerce, it does not follow that the services performed by the appellant, as agent or contractor, are so connected with the interstate transactions as to make those services a part of the interstate commerce. Any effect, at most, of such services upon interstate commerce is but remote, indirect and incidental; therefore, such activi-

ties of appellant as agent or contractor are within the state's legitimate taxing power.

The judgment is affirmed.

MILLARD, J.

We concur:

HOLCOMB, J.
BEALS, J.
BLAKE, J.
GERAGHTY, J.
SIMPSON, J.

No. 26793

ROBINSON, J. (dissenting):

I dissent from the foregoing opinion because I think the majority are in error both as to the facts presented in the case and as to the principles of law applicable thereto. The factual error appears most prominently in the following pivotal excerpt from the opinion:

> "* * * The appellant is a domestic corporation *operating, entirely within this state,* a business which is exclusively with his principals, certain fruit growers; and for its services to its principals the appellant is paid a commission as recited above * * *." (Italics mine.)

The complaint alleges, and the demurrer admits, that the appellant is engaged in the business of distributing Washington grown apples and pears throughout the states of the Union, and in a number of foreign countries; that it maintains sales representatives at many points outside the state of Washington who at such points negotiate said sales and execute written contracts of sale "on behalf of the appellant." The appellant's compensation is fixed at so much per box, that is to say, it is calculated per unit of volume.

It further alleges:

> "That as a further part of its business plaintiff handles the bills of lading on all shipments made in com-

pliance with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to the plaintiff at extra-state points, and that through its foreign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom which are thereafter forwarded to the plaintiff at Seattle, Washington, all in the course of interstate and foreign commerce."

All of these allegations (except, of course, the last nine words of the quotation) are admitted by the demurrer. I do not see how the majority can rightly say that these allegations describe a concern operating "entirely within this state." To me, it pictures a far-flung business, actively operating in many of our sister states, and in a number of foreign countries, in distributing Washington grown apples and pears throughout the channels of trade, a concern which, however, has, for quite understandable reasons of convenience, chosen to incorporate itself and maintain its head office in the state of Washington, the source of the product which it is engaged in distributing.

That interstate and foreign commerce is not confined to transportation of goods from one state to another or from one country to another, but comprehends, in addition, all commercial intercourse between states and countries and all activities necessary to its accomplishment, is so elementary that the citation of judicial decisions so holding would be superfluous. It is obvious that the mere carriage or transportation of the Washington fruit to New York, Philadelphia, or Boston, or to London, Paris, or Rome, would be futile unless someone performed the various services with relation to the shipments which the appellant alleges it performs. Without these services the commerce involved could not be accomplished. Nor do I perceive any distinctive difference between the nature of the services performed by the appellant and the services performed by the railroad company which carries the fruit across the country, or the steamship company which carries it overseas.

As to the fruit growers, both the appellant and the transportation company are independent contractors. The appellant's services are paid for, not by a commission upon

the value or sale price of the fruit, but are calculated per unit of volume. The transportation company's compensation is, to a large extent, directly proportionate to weight and volume. The services performed by each are services necessary to the commerce involved. Upon what theory, then, is it cheerfully admitted on the one hand that a tax upon the transportation costs (the freight) would be a direct burden upon interstate or foreign commerce, and hotly contended on the other hand that a tax upon the other equally necessary and inescapable distribution costs is not?

The fact is that, although the opinion of this court in Puget Sound Stevedoring Company *v.* The Commission of the State of Washington was reversed on November 8th last by the Supreme Court of the United States, — U. S. —, 58 S. Ct. 72, 82 L. Ed. Adv. Op. 64, its erroneous reasoning is by the majority again made the basis of decision in this case. In that case, the court held the compensation of the stevedoring company taxable because (1) earned wholly in a local business; and (2) carried on by an independent contractor. In this case, the majority attempts to fit the facts to (1) of that formula by reducing the appellant's status to that of a mere commission merchant performing a merely local service, and this is done notwithstanding the broad admissions of the demurrer to the contrary. Having done that to their satisfaction, the majority proceed to apply the exploded and discredited "independent contractor" theory originally announced in the reversed Puget Sound Stevedoring Company case, and thus arrive at their decision.

As justification for this rather strong language, I quote the following excerpt from the very heart of the majority opinion:

> "* * * Appellant renders an independent service—engages in a business within this state * * *"

And lest this be insufficient to prove the point, I quote from that portion of the opinion which states the actual decision in the case:

> "* * * it (the appellant) is merely a local agent for growers and associations in this state who have

> fruit to be sold. If those fruit growers and associations chose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business."

The last sentence in the above quotation constitutes the decision in this case. It does not meet the test of either reason or authority. The fruit growers made a contract with the appellant in which the appellant agreed to render, for so much per box, certain services in connection with exchanging their fruit for the money of consumers in other states and countries. Let it be assumed that they at the same time also made a contract with a railroad to perform the actual carriage required by this commerce. Would the railroad be any less an independent contractor than the appellant? If not, and no other answer is possible, could its compensation under its contract be taxed? The answer is no, even though it is an independent contractor—for such a tax would be a burden upon interstate and foreign commerce. Neither can the compensation of the appellant be taxed *if* its compensation is received for services rendered in interstate and foreign commerce. The nature of the service is wholly decisive, and whether or not it is rendered by an independent contractor has nothing whatever to do with the matter.

I do not pursue this subject further because, in the first place, it is vain to labor overmuch in attempting to establish the obvious, and, second, the question has been settled by authority binding upon this court. In reversing the judgment of this court in the Puget Sound Stevedoring Company case, *supra*, the Supreme Court of the United States said, less than three months ago, that the judgment was

> "* * * placed upon the ground that the taxpayer was an independent contractor engaged in a local business,"

and, speaking through Mr. Justice Cardozo, disposed of the "independent contractor" theory in the following words:

"The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. *What is decisive is the nature of the act, not the person of* the actor." (Italics mine.)

The rationale of the majority opinion is, therefore, clearly unsound. I think the result is also. Whether it is or not wholly depends upon whether or not the appellant renders a foreign and interstate commerce service, as has been indicated at the beginning of this dissent. I think that the complaint alleges facts which show that it does render such services in other states and in foreign countries, services indispensable to the accomplishment of the commerce involved, and some of them not differing in character from the services rendered by the carrier which transports the fruit.

The majority say that the appellant's business is entirely carried on in this state, and that it is in no sense interstate in character. But when it is admitted that the appellant, acting through its representative, which is the only way a corporation can act, calls on a dealer in New York or London, negotiates a sale of Washington fruit, makes a contract in its own name, and, subsequently, personally attends to the delivery and collection of the proceeds, I need more than I find in the majority opinion, and more than I think can be found anywhere else, to convince me that these acts are performed in the state of Washington, or that the collection of the freight, for example, is an act in any way differing in nature from a transportation company's collection on a C. O. D. shipment.

In my opinion, the rule or judgment appealed from should be reversed.

ROBINSON, *J.*

We concur:

MAIN, *J.*

STEINERT, *C. J.*